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No. 99-1178

IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF JAMES J. WILSON IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

James J. Wilson submits this brief *amicus curiae* in support of the petitioner.[1] All parties to this case have given their written consent to the participation of Mr. Wilson, and copies of these written consents have been lodged with the Clerk pursuant to Rule 37.3(a) of the Supreme Court Rules.

Mr. Wilson was the prevailing party in *United States v. Wilson*, a criminal wetlands prosecution brought in the District of Maryland in 1996. His conviction at trial and 21 month sentence were overturned by the Court of Appeals for the Fourth Circuit, see 133 F.3d 251 (4th Cir. 1997), in a decision virtually ignored by the Seventh Circuit below, see *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 851-52 (7th Cir. 1999).

Mr. Wilson submits this *amicus* brief because the *Wilson* prosecution sheds light on two significant matters relevant to the present controversy: (1) the government's repeated and aggressive efforts to bring criminal prosecutions under the Clean Water Act ("CWA" or "Act"), based on expansive statutory and regulatory interpretations propounded by the U.S. Army Corps of Engineers ("Corps") in civil cases and administrative proceedings; and (2) the government's limitless view of the Corps' jurisdiction to define and regulate waters and wetlands under the CWA, as exemplified by the government's positions before, during, and in the aftermath of the *Wilson* case. The *Wilson* prosecution persuasively demonstrates that the government believes the Corps has the power to

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[1] Counsel for *amicus curiae* James J. Wilson wrote this entire brief. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

regulate all waters anywhere, and will employ the full force of the criminal sanction to further its regulatory objectives, even at the expense of such basic criminal law protections as fair warning and mens rea.

* * *

Mr. Wilson is the founder and former Chief Executive Officer of Interstate General Co., L.P., a publicly traded land development company. Over the past three decades and at a cost in excess of $150 million, Mr. Wilson has designed and developed the 9100-acre planned community of St. Charles, Maryland.

Mr. Wilson developed the St. Charles project in partnership with the federal government and after years of careful environmental planning, which included detailed plans for the ditching and draining of wet areas on the property. The Corps reviewed these plans (as did other federal agencies) and concluded that the CWA did not provide jurisdiction over the development as proposed. Thereafter, for nearly 20 years, Mr. Wilson developed the project in accordance with these plans and without the Corps raising any CWA-related concerns.

In September 1995, Mr. Wilson and two limited partnerships were indicted in the District of Maryland for four felony and four misdemeanor violations of the CWA, 33 U.S.C. § 1251 *et seq*. Following a seven week trial, a jury convicted each defendant on the four felony counts charging them with knowingly discharging fill material (*i.e.*, dirt) into wetlands without a permit, in violation of 33 U.S.C. §§ 1319(c)(2)(A) and 1311(a). In June 1996, the district court sentenced Mr. Wilson to 21 months imprisonment, one year of supervised release, and a $1,000,000 fine. The partnership defendants were jointly fined $3,000,000, placed on probation for five years, and

ordered to implement a wetlands restoration and mitigation plan proposed by the government.

The properties that were at issue in the *Wilson* prosecution are situated more than ten miles from the Chesapeake Bay and more than six miles from the Potomac River, and are as far removed from navigable waterways as any land in southern Maryland. Nevertheless, the government argued that wetlands on these properties were subject to federal regulation as "waters of the United States" because they form part of the "drainage pattern" in the region, and "eventually" drain or flow (through a series of intermittent streams and non-navigable creeks) into larger waters. Under this theory, few (if any) waterbodies in the country would be beyond federal authority.

On appeal, the Fourth Circuit reversed Mr. Wilson's convictions, in part because it held invalid one of the federal regulations – 33 C.F.R. § 328.3(a)(3) – on which the government's limitless jurisdictional theory was based. *See Wilson*, 133 F.3d at 257. The court of appeals found that by defining "waters of the United States" to include "[a]ll other waters," the use, degradation, or destruction of which "could affect" interstate commerce, section 328.3(a)(3) "expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Id.* "[A]s a matter of statutory construction," the Fourth Circuit held, "one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.*

Following remand to the district court, the government dismissed all criminal and civil charges against Mr. Wilson, and accepted a corporate plea on a single felony count from one of the limited partnerships.

SUMMARY OF ARGUMENT

In determining the reach of the phrase "waters of the United States," 33 U.S.C. § 1362(7), and thus the scope of the Corps' jurisdiction under the CWA, this Court should find that the statute regulates only waters that are navigable in fact, interstate, or closely related to navigable or interstate waters. This standard comports both with the language and history of the CWA, and with the scope of authority delegated to the federal government under the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. Because the Corps' so-called "migratory bird rule," 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986), interprets "waters of the United States" to include isolated, intrastate waters that have nothing to do with navigable or interstate waters, this Court should hold that it is invalid.

As the Court confronts this question of statutory construction, two significant matters that relate to the government's enforcement of the CWA should inform its decision. First, although the present appeal involves a civil permit dispute, violations of the CWA can and do result in severe criminal penalties. In seeking such penalties, the government has repeatedly based criminal prosecutions on expansive statutory and regulatory interpretations obtained by the Corps in civil and administrative proceedings where *Chevron* deference is routinely provided. The fair warning concerns implicated by this practice are particularly acute given the diluted mens rea requirement many courts have applied under the Act. Precisely because the CWA is a criminal statute, *amicus* submits that it should be interpreted consistently as such, with any ambiguities being resolved against the government. No deference should be given to the Corps' informal interpretations of the Act or the regulations promulgated thereunder.

Second, the Corps has failed to draw any line – or even to hint at the possibility that any line could or should be drawn – limiting the reach of federal authority under the Clean Water Act. Rather, by employing various regulatory schemes, all of which espouse a theory of jurisdiction that is without bounds, the Corps has revealed its intent to regulate all waters anywhere. As the history of the *Wilson* prosecution demonstrates, the government does not concede any jurisdictional limits on the Corps' power to regulate the nation's waters, and it consistently ignores and/or evades any judicial decisions that identify boundaries to federal jurisdiction.

ARGUMENT

I. Because the Clean Water Act Contains Criminal Sanctions, the Court Should Not Give *Chevron* Deference to the Corps' Statutory and Regulatory Interpretations, Including the Migratory Bird Rule.

Invoking *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Corps has repeatedly argued for and obtained expansive statutory and regulatory interpretations of the offenses prohibited and areas subject to regulation under the CWA. In the decision below, for example, the Seventh Circuit applied *Chevron* deference in approving the migratory bird rule. *See Solid Waste Agency*, 191 F.3d at 851-52. The government has then relied on these far-reaching civil and administrative precedents to buttress statutory and regulatory arguments in criminal prosecutions under the Act – a context where deference to expansive agency interpretations is impermissible. This Court should make clear that because the CWA is a criminal statute, the Corps is not entitled to *Chevron* deference in support of its questionable statutory and regulatory interpretations.

A. Criminal Prosecutions Under the Clean Water Act Are Frequent.

Since its inception in 1972, the CWA has contained a dual civil/criminal enforcement structure, whereby both civil and criminal penalties are available for violations of the various statutory offenses. 33 U.S.C. § 1319. Under this scheme, the distinction between civil and criminal violations is a mens rea element; while civil enforcement actions require no proof of mens rea, criminal prosecutions must establish a "culpable" state of mind. *Compare id.* § 1319(c) *with id.* § 1319(d). Where the requisite mens rea can be established, heightened penalties, including incarceration, are available. *See id.*

Prior to 1987, the single criminal provision of the CWA, which covered both "willful" and "negligent" violations, was only a misdemeanor, and provided for incarceration of not more than one year, and/or a fine of $2,500 to $25,000 per day of violation. 33 U.S.C. § 1319(c)(1) (1972). As a result, federal law enforcement personnel were perhaps less than enthusiastic about devoting resources to the investigation and prosecution of CWA offenses. *See* 2 *Law of Environmental Protection* § 12.08[1][d] (Sheldon M. Novick et al., eds., 2000).

In 1987, however, Congress amended and significantly enhanced the criminal penalties available under the CWA, replacing the single criminal provision with the separate misdemeanor and felony provisions that now appear at 33 U.S.C. § 1319(c)(1)-(2) (1987). Negligent violations of the Act remain punishable by up to one year imprisonment and/or a fine of up to $25,000 per day, while "knowing" violations are punishable by up to three years imprisonment, and/or a fine of from $5,000 to $50,000 per

day of violation. *See id.*[2] These maximum sanctions are doubled for violations committed after a first conviction. *See id.*

As a result of the 1987 amendments to the CWA, criminal prosecutions – and the threat of such prosecutions – are now a prominent feature of the CWA enforcement landscape. *See, e.g., United States v. Mango*, 199 F.3d 85 (2d Cir. 1999); *Wilson*, 133 F.3d 251 (4th Cir. 1997); *United States v. Hartsell*, 127 F.3d 343 (4th Cir. 1997); *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997); *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994); *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992); *see also* cases cited *infra* p. 11.

B. The Government Repeatedly Has Attempted to Blur the Distinction Between Criminal and Civil Enforcement Actions Under the Clean Water Act.

Given the lengthy periods of incarceration imposed for criminal violations of the CWA, one would expect distinct standards for proving civil and criminal violations. Nevertheless, as the history of Mr. Wilson's prosecution illustrates, there is little practical difference between a civil enforcement action and a criminal prosecution, because courts in the latter context: (1) rely on (and allow the government to argue based on) deference-driven civil and administrative precedents that expansively define statutory and regulatory terms; and (2) interpret the mens rea requirement of the felony provision as prescribing far less than a specific intent standard.

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[2] The 1987 amendments also added a provision prohibiting "knowing endangerment" – where a defendant knowingly places another person in imminent danger – with penalties of up to 15 years imprisonment and/or a fine (for individual defendants) of up to $250,000. 33 U.S.C. § 1319(c)(3).

1. The Invocation of *Chevron* Deference in Criminal Clean Water Act Prosecutions.

The considerable deference that courts have given to agency interpretations of the CWA in civil and administrative proceedings has allowed the Corps to expand significantly the reach of the statute, both in terms of the areas supposedly subject to regulation and the activities allegedly proscribed by the Act. Armed with these precedents, the government has aggressively pursued criminal prosecutions based not on the plain and unmistakable terms of the Act or the regulations promulgated thereunder, but on those same expansive statutory and regulatory interpretations.

For example, in *Wilson*, the government relied on civil precedents to argue that the waters at issue – located miles from the nearest navigable waterway – were subject to federal jurisdiction. Specifically, the government requested that in instructing the jury on the terms "waters of the United States" and "adjacent," the district court incorporate standards derived solely from civil case law. Thus while the Code of Federal Regulations defines "adjacent" as "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), the government sought (and received) an additional instruction that a wetland may be "adjacent" even "without a direct or indirect surface connection to other waters of the United States" – a dramatic expansion of the Act based on prior civil decisions. *Wilson*, 133 F.3d at 258. *Cf. Ellen*, 961 F.2d at 465-66 (government witnesses at criminal trial permitted to testify that certain areas were wetlands based on definitions contained in Corps' "wetland delineation" manual).

The government in *Wilson* also relied extensively on civil cases to support its contention that the activities at issue were proscribed by the Act. Specifically, the

government sought to incorporate standards derived from civil cases when instructing the jury on the terms "pollutant," "discharge of dredged or fill material," and "point source." Thus, for example, in the absence of any explicit statutory or regulatory support for its claim that "sidecasting" (the placement of excavated dirt alongside drainage ditches in wetlands) constitutes the "discharge" of a pollutant, the government relied on *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Yet as the Fifth Circuit made clear in that civil case, its decision was guided by deference to an interpretation espoused by the Corps and the Environmental Protection Agency ("EPA"). *See id.* at 924 n.43 ("We hold only that the agencies' interpretation that redepositing materials may be a discharge requiring a § 404 permit is '"correct" to the extent that it can be said with complete assurance that any particular interpretation of [this] complex statute . . . is the "correct" one.'") (citation omitted). In other words, a statutory interpretation originally derived in a civil setting using deference is then held out by the government in a subsequent criminal prosecution as the applicable legal standard, despite the absence of any other statutory or regulatory support.

The government's misuse of such civil precedents in seeking criminal convictions is not an uncommon practice. *See, e.g., United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 648-49 (2d Cir. 1993) (rejecting government's reliance on "broad dicta" from civil case in support of its argument that a "human being" can constitute a "point source" under the Act, and reversing conviction). This process of defining standards for criminal prosecutions by bootstrapping from prior *Chevron*-based decisions deprives criminal defendants of fair warning. *See infra* pp. 12-14.

2. The Dilution of Intent Requirements in Criminal Clean Water Act Prosecutions.

The government's use of expansive statutory and regulatory interpretations arrived at in civil proceedings to sustain criminal convictions is especially troubling in view of its simultaneous efforts to dilute the mens rea requirement for CWA convictions. Although the Act provides that a felony is committed only if one "knowingly violates" the statute's proscriptions, 33 U.S.C. § 1319(c)(2)(A), the government consistently has taken the position that this language requires proof neither of the defendant's knowledge of the law, nor the defendant's knowledge of all of the relevant facts that render his conduct illegal, nor any culpable state of mind on his part. This watered-down intent standard, which some courts of appeals have adopted, see *infra* p. 11, leaves a defendant virtually powerless to rebut any showing that he acted with a "criminal" state of mind.

For example, Mr. Wilson was charged with "knowingly violat[ing]" 33 U.S.C. § 1311(a), a substantive offense consisting of four elements: (i) the addition of a pollutant; (ii) from a point source; (iii) into waters of the United States; (iv) without a permit. *Wilson*, 133 F.3d at 260. In instructing the jury on the requisite mens rea, the district court required the government to prove only that Mr. Wilson knew: "one, that the areas which are the subject of these discharges had the general characteristics of wetland; and, two, the general nature of [his] acts." *Id.* Such an instruction barred consideration of all evidence of good faith and lack of criminal intent on Mr. Wilson's part. Instead of being required to prove that he deliberately intended to violate the law, the government was obligated to show only that he knew that dirt had been added to the properties in question.

On appeal, the Fourth Circuit held that the district court's mens rea instruction was erroneous, warranting a new trial. *See Wilson*, 133 F.3d at 265. But the court of appeals did not adopt a specific intent standard; rather, the government was required to prove only the defendant's knowledge of the facts establishing each essential element of the offense. *See id.* at 262. The Fifth Circuit has adopted a similar test. *See United States v. Ahmad*, 101 F.3d 386, 389-91 (5th Cir. 1996). But other courts of appeals – specifically, the Second, Eighth, and Ninth Circuits – have acquiesced in the government's contention that felony CWA convictions may be based upon a defendant's knowledge of only the most minimal facts. *See United States v. Sinskey*, 119 F.3d 712, 715-17 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 537-41 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-86 (9th Cir. 1993). In each of these cases, the government was required to show only that the defendants were aware they were discharging the pollutants in question – a wholly lawful activity expressly authorized by their permits – not that they knew their discharges exceeded permit limitations. In at least these circuits, then, CWA defendants can be convicted despite a good faith, albeit mistaken, belief that the discharge in question was authorized by permit.

Because none of the circuits (thus far) has interpreted § 1319(c)(2)(A) as imposing a specific intent standard, and because several circuits have interpreted that provision as essentially consistent with a form of strict liability, fair warning concerns become particularly acute in criminal CWA prosecutions.

C. No Deference Should Be Given to the Corps' Informal Interpretations of the Clean Water Act.

In evaluating the agency's statutory interpretation at issue here, *i.e.*, the migratory bird rule, the Court should not apply *Chevron* deference, but should instead use the rule of strict construction applicable in criminal prosecutions.

1. *Chevron* Deference is Inappropriate in Criminal Clean Water Act Prosecutions.

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). This "time-honored interpretive guideline" serves to ensure both that citizens are given fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985); *see also United States v. Bass*, 404 U.S. 336, 347-48 (1971). The rule of strict construction is no less applicable in criminal prosecutions for violations of the CWA. *See, e.g., Plaza Health Labs.*, 3 F.3d at 649 (applying rule of lenity to construe ambiguous statutory term "point source" strictly in favor of defendant in CWA prosecution); *United States v. Borowski*, 977 F.2d 27, 31-32 (1st Cir. 1992) (strictly construing ambiguous term in "knowing-endangerment" provision in CWA prosecution). As a result, deference to agency interpretations of ambiguous statutes and regulations is inappropriate in the criminal setting.

First, giving deference to an agency's expansive interpretation of an ambiguous CWA provision in a criminal context would be incompatible with the bedrock principle of fair warning. Under *Chevron*, if "Congress has not directly addressed the precise question at issue," the reviewing court typically will defer to the agency's

interpretation as long as it is reasonable. 467 U.S. at 843. In a criminal case, however, the government may not seize on statutory ambiguities to criminalize activities that Congress has not expressly outlawed. *See Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 91-94 (1959); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892). Similarly, although this Court has recognized that, given precise criteria of delegation, administrative agencies have power to define criminal proscriptions through regulations, see *Loving v. United States*, 517 U.S. 748, 768 (1996), any such regulation "must be explicit and unambiguous in order to sustain a criminal prosecution." *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 621 (1946); *see also id.* at 622 ("Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations . . . ."). Because criminal defendants cannot, consistent with fair warning, be convicted unless their conduct is "'plainly and unmistakably' within the provisions of some statute" or regulation, *United States v. Gradwell*, 243 U.S. 476, 485 (1917), courts must resolve ambiguities in their favor – not in favor of agencies' expansive policymaking initiatives.

Second, applying *Chevron* deference in criminal cases is inconsistent with a further rationale underlying the rule of strict construction: because of the seriousness of criminal penalties, and because criminal punishment represents the "moral condemnation of the community," defining criminal activity should remain within the province of the legislature. *Bass*, 404 U.S. at 348. *Chevron* deference allows agency policy judgments, rather than the language of the statute as written by Congress, or the language of the regulation as written by an agency pursuant to a proper delegation of authority, to determine what conduct merits

criminal sanction. And the Corps has no special expertise in determining which types of conduct should be punishable by criminal sanctions.

Given the substantial loss of liberty at stake for defendants charged with criminal violations of the CWA, deference to the Corps is inappropriate. Nothing in *Chevron* or its progeny indicates an intention to depart from the rules of statutory construction that have long applied in the criminal arena.

2. Accordingly, *Chevron* Deference is Also Inappropriate in Civil Clean Water Act Cases.

Theoretically, courts could use different rules of construction to interpret the same statutory provisions in different contexts. That is, in a criminal case, courts could potentially apply the rule of strict construction when interpreting a statute, while applying *Chevron* deference to an agency's construction of the same statute in a non-criminal matter. And, if a statute is relatively free of ambiguity, the choice might not matter, as both interpretive principles might yield the same result. The Clean Water Act, however, is notoriously ambiguous, and has been variously described as a "poorly drafted and astonishingly imprecise statute"[3] that is "difficult to understand, construe and apply"[4] and "devoid of plain meaning."[5] In CWA cases, then, allowing the context of the case to determine

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[3] *E.I. DuPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd in part and rev'd in part*, 430 U.S. 112 (1977).

[4] *American Petroleum Inst. v. Environmental Protection Agency*, 540 F.2d 1023, 1027 (10th Cir. 1976).

[5] *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 627 (2d Cir. 1976).

whether *Chevron* deference is applied would inevitably lead to inconsistent interpretations of the same statutory provisions.

The need to construe a given term consistently, however, compels the conclusion that no deference is owed to agency interpretations of criminal statutes such as the CWA, regardless of the context of the case. This result follows from this Court's decision in *Federal Communications Comm'n v. American Broad. Co., Inc.*, 347 U.S. 284 (1954), which involved a facial challenge to an FCC regulation governing broadcasting licenses. The Court held that, in promulgating a regulation that would withhold licenses from stations that broadcast lotteries of a type prohibited by § 1304 of the criminal code, the FCC had interpreted the criminal provision too broadly.

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. . . . [I]t would do violence to the well-established principle that penal statutes are to be construed strictly.

American Broad. Co., 347 U.S. at 296.

More recently, this Court has confirmed that particular care is required when resolving ambiguities in statutes containing dual civil/criminal enforcement schemes, because an interpretation arrived at in a civil setting may implicate criminal enforcement of the statute:

> After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute. The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the [statute] has criminal applications that carry no additional requirement of willfulness. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.

United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-18 (1992). *See also Crandon v. United States*, 494 U.S. 152, 158-60 (1990) (finding it appropriate to apply, in a civil case, the rule of lenity in resolving any ambiguity in the ambit of a criminal statute's coverage).[6]

The Court should use this opportunity to reject squarely the dicta by Justice Douglas in *United States v. Standard Oil Co.*, 384 U.S. 224, 225-26 (1966), suggesting that the rule of lenity does not apply to the interpretation of "pollution" statutes. *Id.* ("whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history" when construing the Rivers and Harbors Act). Lower federal courts have cited *Standard Oil* to approve exceedingly broad interpretations of – and unlimited federal jurisdiction under – the CWA in both criminal and civil cases. *See, e.g., United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974) (as regards water pollution statutes, "the strict construction rule applicable to

[6] And, unlike *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), no long-standing agency regulation promulgated under the formal rulemaking provisions of the Administrative Procedure Act is at issue.

criminal statutes has clearly been modified by the Supreme Court"); *United States v. Hamel*, 551 F.2d 107, 112-13 (6th Cir. 1977) ("it is the rule of *Standard Oil* . . . [that water pollution legislation] be given a generous" rather than a strict construction).

Justice Harlan, in his dissent in *Standard Oil*, 384 U.S. at 236, forcefully rebutted the majority's suggestion that strict construction was not required in reading a criminal statute, simply because it concerned the subject of water pollution. *Id.* (Harlan, J., dissenting) ("The policy [of the rule of lenity] . . . is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand."). Justice Harlan's position is most consistent with this Court's recent holdings in *Thompson Center/Arms* and *Crandon*, which establish that deference to an agency's expansive statutory or regulatory interpretations is misplaced when a criminal statute is at issue. *Cf. Crandon*, 494 U.S. at 160 ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

The requirement of careful, narrow construction of criminal statutes is particularly appropriate as applied to the CWA, given the tremendous range of activity purportedly regulated by the Act. Indeed, while "[m]ost statutes permit anything except what is prohibited, [the CWA] prohibits all regulated conduct involving waters and wetlands except what is permitted." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting from order rejecting suggestion for rehearing en banc). And because innocuous substances such as rock, hot water, and sand are classified as "pollutants" by the Act, see 33 U.S.C. § 1362(6),

ordinary, productive, otherwise-innocent conduct falls within the CWA's purported coverage. The need for fair warning is thus especially strong since casual, day-to-day activities can result in severe criminal sanctions.

Because the Act has severe "criminal applications that carry no additional requirement of willfulness," *Thompson/Center Arms*, 504 U.S. at 517, strict construction of statutory and regulatory ambiguities is required. There is no place here for *Chevron*; no place here for deference.

II. The Government's Limitless View of the Corps' Regulatory Jurisdiction Should be Rejected.

While recognizing in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), that "at least *some* waters that would not be deemed 'navigable' under the classical understanding of that term" may be subject to federal regulation under the Clean Water Act, *id.* at 133 (emphasis added), this Court twice pointedly declined to endorse the Corps' assertion of regulatory authority over "all" intrastate waters, *id.* at 124 n.2 & 131-32 n.8. The waters at issue in that case were "river-side," *i.e.*, situated immediately next to a navigable waterway, *i.e.*, "actually abut[ting] . . . a navigable waterway." *Id.* at 135. Nothing in *Riverside Bayview* stands for the proposition that the Corps has the authority to regulate every intermittent stream, swale, drainage flow, and wetland in the nation.

Nonetheless, in the fifteen years since *Riverside Bayview*, the government steadfastly has attempted to expand its authority under the CWA into a mandate to regulate every drop of water in the country. Seizing on the undefined statutory phrase "waters of the United States" (which in turn defines the phrase "navigable waters"), the Corps consistently asserts its jurisdiction to the fullest –

and beyond. As the history of the *Wilson* prosecution illustrates, the government will not recognize or concede *any* limits on the Corps' (or EPA's) jurisdiction under the CWA.

A. The Corps Has Attempted to Regulate All Waters Anywhere.

1. The Corps' Position Prior to *Wilson*: Regulation of All Waters, Under the Migratory Bird Rule.

In every circuit save the Fourth, the Corps purports to regulate isolated waters of the type at issue both in *Wilson* and in the present appeal based on the possibility that migratory birds crossing state lines might visit them. *See, e.g., Leslie Salt Co. v. United States*, 55 F.3d 1388, 1390-92 (9th Cir. 1995). As the government itself has conceded, the "migratory bird rule" purports to allow federal regulation of any body of water – or even puddle – where a well-traveled bird might choose to alight. *See Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 961 F.2d 1310, 1321 n.9, *reh'g granted, order vacated*, 975 F.2d 1554 (7th Cir. 1992). This assertion of jurisdiction is boundless, and would stretch the CWA to cover virtually every piece of property in the country.[7]

In *Wilson*, however, the government could not assert jurisdiction over the properties based on the actual or

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[7] *See, e.g.*, J. Blanding Holman, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 197 (1995) ("[M]igratory flyways cover the entire United States and, as birdwatchers will attest, migratory birds will alight almost anywhere. Thus the migratory bird rule . . . operates as a limiter-manque – a limiting rule with no limits.").

potential presence of migratory birds. Prior to Mr. Wilson's indictment, the Fourth Circuit in *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728-29 (E.D. Va. 1988), *aff'd*, 885 F.2d 866, 1989 WL 106990 (4th Cir. 1989), rebuffed the government's reliance on the 1985 internal Corps memorandum that first asserted this dubious theory of jurisdiction. The Fourth Circuit found the memorandum to be a substantive rule that should have been promulgated in accordance with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. *See Tabb Lakes*, 1989 WL 106990 at *2.

Soon after the *Tabb Lakes* ruling, the Corps and EPA issued a joint memorandum, which pronounced the decision "incorrect" and expressly instructed their personnel not to obey the ruling outside the Fourth Circuit. *See Clean Water Act Section 404 Jurisdiction Over Isolated Waters In Light of Tabb Lakes v. United States* (Jan. 24, 1990). The memorandum further instructed Corps and EPA officials *within* the Fourth Circuit to continue to assert jurisdiction over isolated wetlands, but not to base such jurisdiction on the migratory bird memorandum. *See id.* In other words, the Corps simply ignored the *Tabb Lakes* ruling, and carried on with its practice of regulating all waters everywhere. This became unmistakably evident during the *Wilson* prosecution.

2. The Corps' Position During *Wilson*: Regulation of All Waters, Under the "All Other Waters" Drainage Theory.

Although located miles from the nearest navigable water, the government argued that the properties at issue in *Wilson* were subject to federal regulation because they form part of the "drainage pattern" in the region: any surface moisture on the parcels "eventually" drains into

"intermittent streams,"[8] which in turn "eventually" drain into two non-navigable creeks, which in turn "eventually" connect with the "headwaters" of the Potomac River. At trial, one government witness – a Corps employee – testified that federal jurisdiction under the Act covers all upstream waters "to the tip of the drainage." He explained that because St. Charles, Maryland, has an average elevation of more than 200 feet above sea level, "all the water runs downhill . . . leaves the site and goes down the streams." In the prosecutor's words: "It's all in the drainage. . . . [I]t's all in the drainage, it all drains downward. . . . It's all heading down to the Potomac."

Regulation of the *Wilson* parcels was thus grounded on the assertion that a sporadic water flow in a drainage watershed – however tiny, however intermittent, and however remote from a navigable waterway – is sufficient to establish federal jurisdiction. The government went so far at trial as to assert jurisdiction merely because *rainfall* landed on the properties: "It's true, is it not, [that] . . . water that falls on these areas is going to eventually drain into either the system that goes to Port Tobacco Creek or into the system that goes to Piney Branch?"; "What is rainfall when it hits the ground but surface water?".

The prosecution offered no evidence that the allegedly illegal CWA discharges (*i.e.*, the addition of dirt) actually affected navigable waters or interstate commerce in any way. Instead, the government's "proof" of an interstate commerce "effect" consisted of generalized speculation that conduct similar to Mr. Wilson's might have some remote impact upon beavers and rockfish that could potentially travel in interstate commerce. To this end, a

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[8] The water flow in so-called "intermittent streams" disappears entirely for long portions of the year.

"fur-bearing expert" testified at trial that 48 beavers were trapped in all Charles County in 1990 and 1991 (but none on Mr. Wilson's properties); that beaver pelts are shipped out of Maryland for processing; and that there is a market for muskrat and raccoon meat. Similarly, a "rockfish expert" told the jury that increased sediment and nutrients downstream might affect the supply of aquatic creatures eaten by rockfish in larger bodies of water, before the rockfish travel to even larger bodies of water where they are sometimes caught by out-of-state fishermen and sold to out-of-state consumers. The government also presented testimony that tadpoles, beavers, fox tracks, crayfish - and at least one swimming muskrat - were present on the *Wilson* parcels. The prosecution made no attempt, however, to prove that Mr. Wilson's actions actually affected beavers or rockfish - or water - in any way whatsoever, or otherwise caused any adverse environmental impacts.

The conception of federal jurisdiction espoused by the government in *Wilson* is thus without bounds. Under this view, every drop of surface water anywhere becomes a federal water - because rain falls everywhere, and virtually every area above sea level eventually drains to something that ultimately finds its way to a navigable water. *See Mossburg v. Montgomery County*, 666 A.2d 1253, 1259 & n.5 (Md. App. 1995) (all surface water in Maryland eventually drains into the Chesapeake Bay, Atlantic Ocean, or Gulf of Mexico). Indeed, pursuant to this theory, the Corps has previously claimed to regulate over 27,800 miles of "headwaters streams" in Maryland alone, as well as every water and wetland anywhere near such "headwaters," "intermittent streams," and "drainage areas." *1995 Wetlands Delineation Field Evaluation Form (Maryland)* (June 1995). And, under the government's tadpole/fox tracks/crayfish approach to the Commerce

Clause, all property everywhere is subject to federal regulation because animal life is ubiquitous.

On appeal the Fourth Circuit flatly rejected the "drainage pattern" theory of jurisdiction. *See Wilson*, 133 F.3d at 256-57. The court of appeals recognized that "[t]he government [had] demonstrated that water from these lands flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay." *Id.* at 254-55. The Fourth Circuit concluded, however, that this daisy-chain situation was far from adequate to establish federal jurisdiction. Rather, the "waters of the United States" would include only those waters which, "if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.* at 257. Thus, because the Corps' "other waters" regulation, 33 C.F.R. § 328.3(a)(3), defined "waters of the United States" to include intrastate waters having nothing to do with navigable or interstate waters (*e.g.*, headwaters, intermittent streams, creeks, etc.), the court of appeals declared the regulation invalid. *Id.*

3. The Corps' Position After *Wilson*: Regulation of All Waters, Under the "Tributaries" Theory.

The government's response to the *Wilson* decision was similar to its strategy after *Tabb Lakes*. Neither the Department of Justice nor the Corps sought to clarify or overturn the Fourth Circuit's opinion by seeking either en banc consideration or review from this Court. Instead, the government took the position that even after *Wilson* it could continue to regulate all waters both outside and within the Fourth Circuit.

To this end, in May 1998 the Corps and EPA issued a document providing "guidance" on the effect (or non-

effect) that *Wilson* would have on their assertion of federal jurisdiction under the CWA. *See Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998, as revised June 2, 1998) ("Guidance"). To begin with, the agencies announced their intention not to follow the *Wilson* holding outside the jurisdiction of the Fourth Circuit. *See id.* at 2 ("The Fourth's Circuit's decision in the *Wilson* case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit."). Then, the agencies adopted a business-as-usual posture even *within* the Fourth Circuit. Despite the clear holding in *Wilson*, the Guidance essentially reenacts the limitless "[a]ll other waters" drainage theory of jurisdiction under 33 C.F.R. § 328.3(a)(3) under the guise of regulating "tributaries" under section 328.3(a)(5). Specifically, the federal agencies now purport to regulate "any water body, including any wetland, that is part of, or flows into, or is a wetland adjacent to, a *tributary system* of traditional navigable waters or interstate waters." *Id.* at 3 (emphasis added); *see also id.* at 4 (purporting to regulate "an aquatic area as part of a tributary system"); *id.* (noting that "[t]hese principles apply whether a portion of the tributary system is *intermittent* or perennial") (emphasis added).

By purporting to regulate "tributary systems" under the Guidance, "whether [or not] a portion of the tributary system is intermittent," the government continues to assert jurisdiction over tributaries of tributaries, and tributaries of tributaries of tributaries, *ad infinitum* – even as these so-called "tributaries" become tiny, intermittent streams. As a practical matter, this theory of jurisdiction, if valid, would again result in federal control over all water anywhere, because virtually all water in the country eventually becomes part of some drainage watershed (or

"tributary system"). *See Mossburg*, 666 A.2d at 1259 & n.5. But again, this limitless theory of jurisdiction is precisely the approach rejected by the Court of Appeals in *Wilson*.

The Corps has thus demonstrated its unwillingness to honor judicial constraints placed upon its authority. The agency has declined to identify the boundaries of federal jurisdiction consistent with the *Wilson* decision and the text of the CWA itself. Rather, by employing various regulatory schemes, all of which espouse a theory of jurisdiction that is without bounds, the Corps has revealed its intent to regulate all waters anywhere. This Court should flatly reject the scheme at issue here, "the migratory bird rule," as well as the Corps' limitless theory of jurisdiction under the CWA.

B. This Court Should Adopt the Fourth Circuit's Construction of Clean Water Act Jurisdiction.

In rejecting the Corps' "other waters" regulation, 33 C.F.R. § 328.3(a)(3), the Fourth Circuit explained that as a matter of statutory construction, the CWA regulates only "waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Wilson*, 133 F.3d at 257. This construction of the Act's jurisdictional reach is sound and should be followed here. And because the Corps' overly broad interpretation of the CWA exponentially expands the number of individuals potentially subject to criminal prosecution, adoption of the Fourth Circuit's construction of the Act is particularly important.

First, this construction follows naturally from the language of the statute itself, which expressly regulates the discharge of certain materials into "navigable waters," defined to be the "waters of the United States." 33 U.S.C. § 1362(7) & (12). The migratory bird rule impermissibly

treats the phrase "navigable waters" as mere surplusage, see *Bailey v. United States*, 516 U.S. 137, 145-46 (1995), and thereby fails to draw any line limiting federal authority.

Second, the Fourth Circuit's construction of the CWA is consistent with other statutes using the same language, such as the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (regulating any "navigable water of the United States"); § 403 (regulating every "navigable river, or other water of the United States"), and the Federal Power Act, 16 U.S.C. § 796(8) (similar). Because Congress and the courts for decades have interpreted these terms to refer only to actual navigable waters and their immediate tributaries as used in interstate navigational commerce, there is no reason to conclude that Congress intended in the CWA to sweep within the federal embrace all heretofore-unregulated intrastate waters and wetlands. *See Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939) ("[W]here words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary.").

Third, the Fourth Circuit's statutory construction of the jurisdictional reach of the CWA is consistent with this Court's intimation in *Riverside Bayview* as to where the line between federal and non-federal waters might be drawn: "the waters of the United States" can be said to include navigable waters and their immediate tributaries as used in interstate navigational commerce, as well as "some" waters "*inseparably bound up*" therewith. 474 U.S. at 134 (emphasis added).

Fourth, the Fourth Circuit's CWA construction is consistent with the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bass*, 404

U.S. at 349. If federal jurisdiction under the CWA is completely untied from the concept of navigability, two traditionally local functions - the regulation of land use and the regulation of local water bodies - would become federalized. But in the absence of "clear and explicit language," it cannot be assumed that Congress intended to "supersede entirely the authority which the states . . . have in such matters." *Cummings v. Chicago*, 188 U.S. 410, 430 (1903) (rejecting a contention that the Rivers and Harbors Act reached wholly intrastate waters).

Finally, by adopting this construction of the Act, the Court can avoid the serious constitutional issue that would arise under the Commerce Clause if it were to accept the Corps' limitless conception of CWA jurisdiction. *See Jones v. United States*, 120 S.Ct. 1904, 1911-12 (2000); *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *cf. United States v. Lopez*, 514 U.S. 549, 564 (1995) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

CONCLUSION

The Clean Water Act does not supply the federal government with authority to regulate all waters in the country, but rather bestows federal jurisdiction only over "navigable waters." The migratory bird rule utterly ignores the concept of navigability, and thereby fails to draw any line limiting federal authority. Particularly because the CWA is a criminal statute frequently applied to impose criminal penalties, such limitless reach, grounded on *Chevron* deference, cannot be reconciled with fair

warning and due process. The decision of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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